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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1287

AMERICAN MARITIME ASSOCIATION,
Petitioner,

v.

MICHAEL BLUMENTHAL and
AMERADA HESS CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMERADA HESS CORPORATION

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QUESTION PRESENTED

Section 27 of the Merchant Marine Act, 1920, 46 U.S.C. § 883, known as the "Jones Act," provides for forfeiture of "merchandise . . . transported . . . between points in the United States . . . embraced within the coastwise laws, either directly or via a foreign port," by foreign-flag vessels. The U.S. Virgin Islands are expressly excluded from the coastwise laws by Section 21 of the Act, 46 U.S.C. § 877. The question presented is whether the Jones Act applies to the transportation of

crude oil from Alaska to the Virgin Islands for refining and the subsequent transportation of the resulting products from the Virgin Islands to the U.S. mainland.

STATEMENT

Petitioner, an association of operators of U.S.-flag vessels, filed suit in the district court seeking injunctive relief directing the Secretary of the Treasury to prevent the foreign-flag tank vessel HERCULES from transporting a cargo of crude oil from Alaska to St. Croix, Virgin Islands, and also a declaratory judgment that such transportation violates the Jones Act. Respondent Amerada Hess Corporation, whose subsidiaries were the charterer of the HERCULES, owner of her cargo and owner of a St. Croix refinery to which the crude oil was being transported, intervened as a defendant.[1]

Recognizing that the Alaskan crude oil was being shipped to the Virgin Islands and that the Virgin Islands were expressly excluded from the coastwise laws, petitioner contended that the Jones Act was nevertheless applicable on the theory that "petroleum" was being transported from Alaska to the U.S. mainland via the Virgin Islands. It argued that manufacture of the crude into various new and different products in the Virgin Islands is immaterial if the shipper intends from the outset to transport the products to a point within the United States.

The Customs Service (a unit within the Treasury Department) and its predecessors, the agencies responsible for the administration of the Jones Act, have consistently taken the position that the statute does not apply to facts such as those present here. This construction has been affirmed in a long-standing series of administrative in-

[1] An association of domestic shipbuilders and a labor union intervened as plaintiffs and participated in both the trial and appellate proceedings, but have not sought review by this Court.

terpretations to the effect that the statute does not apply to the transportation of merchandise manufactured or processed into new and different merchandise at an intermediate non-coastwise point.[2] The construction was reaffirmed by the Customs Service on the present facts in 1969 (Pet. 7a-8a) and again in 1977, prior to the commencement of the trial below, when it published proposed interpretive regulations (42 Fed. Reg. 46068) stating (Pet. 8a-9a):

> [M]erchandise is not transported coastwise if at an intermediate point or place other than a coastwise point (that is, at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.

Following trial the district court concluded (Pet. 37a-62a) that the transportation involved did not violate the Jones Act, denied the requested relief and dismissed the case. The court of appeals affirmed by unanimous opinion, treating comprehensively each argument made by petitioner (Pet. 3a-33a). Both courts held the above-quoted Customs Service statement to be a correct interpretation of the statute and found from the evidence that the Virgin Islands refining process changed the crude oil into eleven new products, each of which was chemi-

[2] These interpretations, consisting of letter rulings of the Customs Service and its predecessors, are collected in the appendix to respondent Blumenthal's brief in the court below. Typical among them are rulings holding the Jones Act inapplicable to rice shipped from California to the Virgin Islands for milling and packaging, thence to Puerto Rico (a coastwise point) (January 15, 1963); unbleached cotton shipped from the United States to a foreign country for bleaching, then returned to the United States (November 9, 1961); oil shipped from the U.S. Gulf to Aruba for blending with foreign oil to produce low sulphur oil then returned to the United States (November 22, 1968).

cally and physically different from crude oil and used for purposes for which crude oil cannot be used (Pet. 14a-15a).

Petitioner's statement (Pet. 3) improperly asserts various facts allegedly occurring subsequent to the trial below, all relating to the volume of Alaskan crude being transported to the Virgin Islands. These facts are both outside the record and incorrect.

REASONS FOR DENYING THE WRIT

The only basis asserted by petitioner for granting the writ is the alleged importance of the question presented. But the Jones Act has been on the books since 1817 in essentially its present form, except for the clause "directly or via a foreign port" added in 1893. Yet only once, in *United States* v. *250 Kegs of Nails*, 61 F. 410 (9th Cir. 1894), has a question even similar to the present one come before any court.[3]

Moreover, all that turns on the question presented is simply whether the oil in question (involving but a single refinery) moves in unsubsidized U.S.-flag tankers, many of which are operated by petitioner's members, or on foreign-flag or subsidized U.S.-flag tankers. While this may well be important to the private parties, it is hardly a matter of such public importance to warrant this Court's review. *Rice* v. *Sioux City Cemetary*, 349 U.S. 70, 79 (1954); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1925). And even as to the interests of petitioner's members, it is clear that economic decisions could not have been made by them on

[3] *250 Kegs of Nails* held that a pause of unchanged American merchandise in a foreign port before transshipment to the United States was sufficient to render the Jones Act inapplicable. Unlike the present case, the merchandise was in no manner altered and the case prompted the "via a foreign port" amendment referred to above.

the assumption that the Jones Act would be held applicable to the facts of this case, for, as the record shows, they knew at least as early as 1969 that the Customs Service disagreed with them on precisely these facts (see Pet. 7a-8a). In the intervening ten years they have, as many times, unsuccessfully sought to persuade Congress to amend the law to make it applicable to the present facts (Pet. 25a). Nor has the President by proclamation extended the Jones Act to the Virgin Islands as he is free to do even under the existing law (46 U.S.C. § 877).

Both courts below found significant the 1969 Customs Service interpretation, as well as its 1977 proposed interpretive regulation quoted above, that the Jones Act does not apply to the present facts, and also the fact that these recent interpretations were in accord with the long series of administrative interpretations to the same effect referred to at note 2, *supra* (Pet. 16a, note 38, and 56a-59a).

In arguing that the lower courts and administrative agency all have incorrectly interpreted the Jones Act, petitioner is reduced to claiming that their construction is inconsistent with this Court's interpretation of various statutes regulating interstate commerce. Petitioner's argument rests on cases involving either Congress' constitutional power to regulate broad segments of domestic commerce, *e.g. Swift & Co.* v. *United States*, 196 U.S. 375 (1905), or the scope of federal jurisdiction over a particular aspect of commerce, *e.g.*, *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498 (1911). Petitioner argues (Pet. 7) that such decisions have found the term "interstate trade or commerce" sufficient to show a congressional intention to reach "the whole flow" of commerce, notwithstanding intermediate pauses for manufacture, and must be read as showing the same congressional intention with respect to the Jones Act.

It should suffice to say that the present case is not concerned with the subjects addressed in the commerce clause cases relied upon by petitioner. Unlike the various broad remedial enactments involved in the cases cited by petitioner, the Jones Act does not purport to apply its objectives to a broad segment or "flow" of interstate trade or commerce.[4] The Jones Act is a promotional statute protecting a particular segment of U.S. industry from foreign competition in a narrowly-circumscribed area—the transportation of merchandise between points in the United States embraced by the coastwise laws. This narrow protectionist statute expressly states that the coastwise laws do not extend to the Virgin Islands.[5] Whether something is within the flow of interstate commerce simply has nothing to do with whether it involves transportation covered by the coastwise laws. The lower court correctly found the decisions cited by petitioner inapposite to the interpretation of this particular statute which was enacted "for a very specific purpose, with sharply defined contours" (Pet. 21a).

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[4] The court of appeals answered petitioner's argument economically and effectively in footnote 54 of its opinion where it stated (Pet. 22a):

> The fact that an interruption to the flow of goods in interstate commerce does not oust federal regulatory power does not suggest that Congress intended that all regulatory statutes it enacts in the commercial area be applied to every imaginable perambulation of commercial goods. Though manufacture or processing of a product may be too "incidental" to interrupt the flow of commerce generally, such alteration in the nature of the goods may yet be substantial enough to exempt those goods from the intended reach of a particular statute . . . .

[5] Since the statute unequivocally states that the coastwise laws do not extend to the Virgin Islands, it is unnecessary to interpret the Virgin Islands exemption or to address petitioner's argument (Pet. 15) that the lower court erroneously construed it. While the "strict construction" doctrine applicable to forfeiture statutes has vitality for the reasons stated in the lower court's opinion (Pet. 20a-21a), the same construction should be reached wholly apart from that doctrine, particularly in light of the long-standing consistent administrative construction of the law.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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